Brief of Smith for Appellee Co

Filed Nov 23, 1897.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

No. 251.

William Richardson, Trustee,
Plaintiff in Error,
vs.

The Louisville and Nashville Railroad Company and others,
Appellees.

BRIEF BY GREGORY L. SMITH,

of Counsel for Appellee, the Louisville and Nashville Railroad Company, upon Motion to Dismiss for want of jurisdiction.

Rogers Printing Company, 22 Jackson St., Chicago.

IN THE

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STATEMENT OF THE CASE.

This is a suit in ejectment, brought by the plaintiff in error in the Escambia County Circuit Court of the State of Florida, to recover of appellees "a tract or parcel of "land situate, lying and being in said county, known and "described as follows, to-wit: Lots Nos. one, two, "three, four, five, six, seven, eight, in square seven, and "square forty-seven (47), containing four lots, and lots "nine and ten in square number ten, in the water front "of Pensacola, according to the plan of said water front, "by James Harding, the said lots and parcels of land "being on the projection of Tarragona street into the

"bay of Pensacola." (Pr. Rec., 1, 2.) The defendants pleaded not guilty and the case was tried upon this issue.

Upon the trial of the case plaintiff offered in evidence what purported to be a Spanish grant made December 17, 1817, by Alexander Ramerez, intendent of the army, superintendent-general of Cuba and the two Floridas, to Vincente Sebastian Pintado of six tracts; a map of each tract is attached, designated respectively as plats A, B, C, D, E and F. The property in controversy is included in the tract designated as plat C, which tract is described in the translation of the alleged grant as follows: "The "lands designated by the letter C are an extension or "tract of the bay of Pensacola, whose superficies of "water is equal to an area of 718½ arpents, superficial, "occupying between the eastern point of the mouth of "the creek of Casa Blanca, commonly called Bayou Chico, "and the western point of the mouth of the rivulet or "creek of Texar, commonly called Bayou Texar, and a "line drawn in the direction of southeast of the needle, "ninety-five perches of Paris, within the sea, from "the aforesaid first point, and the other line "of 100 of said perches in length, counted "from the second point mentioned within the sea, also "from the same point of south-east of the needle, which "embraces the whole of the front from the one to the "other mouth of the creeks of Casa Blanca and Texar, "between which is the Town of Pensacola, the whole "conforming and according to the plan annexed, made "for the greater clearness and understanding in which is "represented the figure which the said land forms in the "water and the limits within the bay of Pensacola, being "that part of the land and beach which is found between "the said two points of the mouths of the mentioned

"creeks, the curve which the shore of the water of the "sea at the highest tide in calm weather makes, and with "the depth from the surface of the water as far as ten "feet English below the actual bottom, or towards the "center of the earth, in the whole, the space which the "figure represented in the said plan C embraces, consid- "ering it as a solid, since it has these three dimensions of "longitude, latitude and depth. * * * The whole in "full properly and for the purpose of constructing "wharves and houses for bathing, reserving and saving "not only the right of his majesty, but also that of the "public, at all times whenever it becomes convenient, and "it be designed to construct wharves with whatsoever "funds, municipal or common, intending the exclusion "only with respect to particular individuals." (Pr. Rec., 18, 19.) In connection with the grant plaintiff offered to prove its execution.

The defendant objected to the grant upon the following grounds, viz:

"The grant so far as it relates to the *locus in quo* was "a mere license to Pintado to use the property in a par- "ticular way and vested in him no sufficient title upon "which to recover in ejectment.

"Because said grant, so far as it relates to the *locus in* "*quo*, was not an exclusive grant of the property occu- "pied by the defendant.

"Because said grant, so far as it relates to the *locus in* "*quo*, was not within the delegated authority of the offi- "cer who attempted to grant the same.

"Because said grant, so far as it relates to the *locus in* "*quo*, is not one which was validated or recognized by "the treaty between the United States and Spain.

"Because it is not shown that Alexander Ramerez had

"the power or authority to make said grant, so far as it "related to the *locus in quo.*" (Pr. Rec., 6.)

The court sustained defendants' objections without stating any particular reason therefor, and plaintiff excepted generally without specifically claiming any right whatever under any treaty.

This ruling of the court was fatal to plaintiff's recovery, and there was a verdict for defendants; from the judgment in this cause an appeal was taken to the Supreme Court of Florida. In the Supreme Court of Florida the plaintiff in error assigned the following error and no other, viz: "The refusal of the court to admit "in evidence the grant from Alexander Ramerez to Vin-"cento S. Pintado." (Pr. Rec., 27.)

The Supreme Court of Florida affirmed the ruling of the court below, and held that the purpose of the grant as to the water front therein described was not to grant the land and water as such within the described limits, but the right to use the same within the described limits and to the depth stated below the surface of the soil for the purpose of constructing warves and houses for bathing, such right of use being to the exclusion of any similar right of use in any other individuals and subordinate to the right of the king and the public to construct wharves with municipal or common funds within such limits. Also, that while the king of Spain could have made such grant to Pintado, it would have been contrary to his laws then in force in West Florida and a case of special exception from their effect, and that Ramerez had no authority to make the grant, and that it was void and vested no authority in the grantee. (Pr. Rec., 28, 29.)

The Supreme Court of Florida then entered the fol-

lowing certificate: "In this cause, the judgment of the "Circuit Court in and for Escambia County, Florida, "having been affirmed, it is now certified that this is the "highest court of law in the State of Florida in which "a decision in this suit can be had; that the plaint-"iff in error herein claimed that the grant of land "and water relied upon by him, as shown by "the record, was included in the grants which "remained confirmed under the terms of the treaty "between the United States and Spain, dated Febru-"ary 22nd, 1819, and that an inquiry by this court "into the authority of the officer making such grant, he "having general authority to make grants, was pre-"vented by the operation of said treaty; that the de-"cision of this court was adverse to such contention and "determined that such inquiry could be made, and that "said officer had no power to make said grant, and that "said grant was void; and that there was thereby drawn "in question and decided adversely to the plaintiff in "error a title, right or privilege claimed under a treaty "of the United States." (Pr. Rec., 29, 30.)

The Contentions of the Parties.

Plaintiff in error claims that by the treaty between Spain and the United States of February 22, 1819, his claim to hold under a Spanish grant is protected from inquiry by a state court into the authority of the officer to make the grant. That such a contention is a claim of a right, title or privilege under a treaty, within the meaning of the twenty-fifth section of the judiciary act, and that this claim was duly presented to the state court and by it adjudicated adversely to him.

The defendant in error claims, on the other hand, that the record does not show that any such claim was ever affirmatively made in the state court, nor that it was specifically considered and adjudicated by the state court adversely to the plaintiff in error; that such a contention does not constitute a claim of a right, title or privilege under the treaty within the meaning of the twenty-fifth section of the judiciary act, and that the authority of Ramerez to make the grant in question was a proper question for the determination of the state court, and that its decision does not, therefore, raise a Federal question. Appellee further claims that the Supreme Court of the state determined two questions, viz: 1. That the grant was not of the title to the land and water, but of a mere easement in them, and, 2, that Ramerez had no power to make the grant and that the grant was therefore void, and they insist that if the grant was of a mere easement it was not sufficient, though valid, to sustain an action in ejectment, and that the Supreme Court of the United States therefore has no jurisdiction to review the case even if the other question adjudicated did, in itself, involve a Federal question.

ARGUMENT.

I.

THE ALLEGED FEDERAL QUESTION IS NOT SHOWN BY THE RECORD TO HAVE BEEN PROPERLY PRESENTED, IF AT ALL, TO THE STATE COURT.

Except in the certificate of the Supreme Court of Florida, made after the cause was affirmed, there is absolutely nothing in the record, including the opinion of the Supreme Court of Florida, intimating in the remotest manner that the plaintiff in error claimed any right, title or privilege of any kind under a treaty, or that he claimed that the state court had no right to inquire into the authority of Ramerez to make the grant. No such claim is shown to have been made or intimated when the alleged grant was offered in evidence, and there was nothing in the ruling of the Circuit Court tending to show the consideration by it of such a claim; no claim was evenly remotely hinted by the plaintiff in error in his assignment of error in the Supreme Court of Florida, nor does the court, in its opinion, discuss or even refer to that question. It assumes that it had the right to make the inquiry and treats its right to do so as conceeded, and then proceeds to determine the authority of Ramerez to make the grant. The record, other than the certificate of the court, far from showing that such a claim was specially brought to its attention, affirmatively shows that the question was not brought to its attention unless this was done by counsel in argument; it does not show whether any argument of any character was made

before it by counsel for plaintiff in error or not; nor what that argument, if any, was, but by implication the opinion of the court tends to negative the idea that any such claim as that certified was argued before it; the opinion deals with other matters, and contains no reference to, or discussion of, the question now claimed to have been presented to it. The treaty between America and Spain is not even referred to in the opinion. The absence of all mention of this treaty by the court is most suggestive when it is remembered that when the alleged grant was offered in evidence defendant in error objected to it upon three grounds, viz.: That the alleged grant was only a license to Pintado to use the property for particular purposes and did not vest a title in him upon which he could maintain an action in ejectment; that Ramerez had no authority to make the grant; and because the grant, so far as it relates to the *locus in quo*, is not one which was validated or recognized by the treaty between the United States and Spain. (Pr. Rec., 6.) The court, with three distinct propositions before it, discussed and decided two of them, and entirely ignored the third. If the contention now made by the plaintiff in error had been pressed upon the Supreme Court of Florida, it could not have reached the question of Ramerez' authority without first disposing of it, and yet it passes to the consideration of Ramerez' authority without as much as a passing reference to the treaty. I respectfully submit, therefore, that the opinion strongly tends to negative the idea that the present contention of the plaintiff in error was ever presented to the state court until after the decision of the court had been rendered, and a contention then presented for the first time comes too late and cannot be considered by this court.

Sayward v. *Denny*, 158 U. S., 180.

But, be that as it may, it is certain that the record, other than the certificate of the court, does not show that the question was presented to the state court.

The office of the certificate of the state court is only to make certain and specific what is too general and indefinite in the record.

Roby v. *Colehour*, 146 U. S., 153.
Dibble v. *Bellinger Building and Loan Co.*, 163 U. S., 63.

The certificate will be treated with respect, but cannot confer jurisdiction upon the Supreme Court of the United States to review the case.

Sayward v. *Denny*, 158 U. S., 180.
Jersey City & Bergen R. R. Co. v. *Morgan*, 160 U. S., 288.
Winona & St. Peter Land Co. v. *Minnesota*, 159 U. S., 540.

The case of *Sayward* v. *Denny* (*supra*) seems conclusive against the jurisdiction of the court, because the alleged Federal question is not shown by the record, other than in the certificate of the state court, to have been properly presented. Sayward, through his agent, Meigs, contracted with Haller for the purchase of some logs, and one Crawford and others became his sureties upon the contract; Haller sued both the principal and sureties upon the contract, but service was not obtained upon Sayward. Crawford and the other sureties appeared and defended the action and judgment was rendered against them; Crawford died and Denny and another became his executors and were compelled, under execution, to pay part of the judgment; they then sued Sayward to recover the money so paid. The declaration set out the facts upon which the

action was based and Sayward demurred to it; the demurrer being overruled, he pleaded that he was never served with process in the suit in which the judgment was rendered. Upon the trial he objected to the introduction of the judgement in evidence, but the grounds of his objection, if any, do not appear from the report of the case. The objection was overruled and there was a judgment against him, this judgment was affirmed by the Supreme Court of the state and a Federal question—the validity of the original judgment against Sayward for want of due process of law—seems to have been certified to this court, but this court held, among other things, that it nowhere *affirmatively* appeared in the record that the right to have the judgment excluded because process in that cause was not served on Sayward was set up *at the time the court ruled upon the question.* It will be noted that this right had been expressly set up by a plea but it did not affirmatively appear, unless in the certificate of the state court, to have thereafter been affirmatively insisted upon, while in the case at bar the question was not set up by replications or otherwise, and no reference can be found in the record, other than in the certificate of the Supreme Court of Florida, to the question now sought to be raised.

II.

IF IT WERE CONCEDED THAT THE QUESTION NOW RAISED INVOLVES A FEDERAL QUESTION, AND THAT IT WAS PRESENTED TO THE STATE COURTS AT THE PROPER TIME AND IN A PROPER MANNER STILL THIS COURT WOULD HAVE NO JURISDICTION TO REVIEW THE CASE.

Where the Supreme Court of the state bases its decision upon two grounds either of which are conclusive of

the case, this court will not review the decision, though one of the grounds of the decision involves a Federal question.

Eustis v. *Bowles*, 150 U. S., 362.

The first ground of objection made by the defendant to the introduction of the alleged grant in evidence was that "the grant, so far as it relates to the *locus in quo*, "was a mere license to Pintado to use the property in "a particular way, and vested in him no sufficient title "upon which to recover in ejectment" (Pr. Rec., 6). The Circuit Court sustained the objection without specifying upon what particular ground it acted, but the Supreme Court of Florida discussed the questions involved in this particular ground of objection and held that the grant created a franchise merely and vested no title. This alone was conclusive of the case, as ejectment cannot be sustained without either title or prior possession, and the decision of a Federal question, in addition to this, would not authorize this court to review the case.

III.

DOES THE PROPOSITION NOW RELIED UPON BY PLAINTIFF IN ERROR INVOLVE A FEDERAL QUESTION THAT WOULD HAVE GIVEN THIS COURT JURISDICTION TO REVIEW THE THE CASE HAD IT BEEN PROPERLY PRESENTED TO THE STATE COURT AND THE SOLE QUESTION DETERMINED BY IT?

The only reference in the record to the question now relied upon is in the certificate of the state court, and is as follows, viz:

"That the plaintiff in error herein claimed that the

"grant of land and water relied upon by him, as shown "by the record, was included in the grants which re- "mained confirmed under the terms of the treaty between "the United States and Spain, dated February 22, 1819, "and that an inquiry by this court into the authority of "the officer making such grant, he having general au- "thority to make grants, was prevented by the operation "of said treaty." (Pr. Rec., 30.)

The treaty of 1819 created no new property rights whatever; it merely recognized rights that already existed, and stipulated that all Spanish grants made prior to January 24, 1818, should remain ratified and confirmed to the same extent that they would have been valid had the property granted remained under the dominion of Spain. In this respect the treaty only stipulated what would have resulted independent of the treaty under the general doctrines of international law.

United States v. *Perchman*, 7 Peters, 86.

The mere fact that the plaintiff in error claims a right under a treaty is not sufficient to create a Federal question; if that were sufficient, a Federal question could be introduced into every record at the will of either party. The right itself must be one in fact, arising under, or protected by, a treaty, and this is determined as a matter of law by the court, and is not concluded by the mere claim or contention of the plaintiff in error. In the case of the *City of New Orleans* v. *Amas*, 9 Peters, 224, the controversy as in this case, was as to the title to land under grants of governments formerly owning the territory (Spanish and French). Amas claimed under an incomplete Spanish grant, confirmed by an act of Congress,

after the territory was ceded to the United States, while the City of New Orleans claimed that the property was part of the quay of the city as originally platted; that Spain had no right to grant the property to Amas, and that its title was confirmed and protected by the treaty; and that Amas' grant was therefore void. The decisions of the state courts were in favor of Amas, and the cause was brought to this court; it was held that no Federal question was involved, and the cause was dismissed for want of jurisdiction.

In the case of *Cheutoau* v. *Eckhart*, 2 Howard, 354, each party claimed under an act of Congress, confirming incomplete Spanish titles; it was held that a Federal question was involved, because the claim of each party was under an act of Congress confirming their respective titles, but that had the claims been based upon complete Spanish grants there would have been no Federal question involved. This distinction, as to the difference in effect between a complete and an incomplete grant, upon the jurisdiction of this court is strongly marked by the more recent case of the *California Powder Company* v. *Davis*, 151 U. S., 359. Davis filed a bill in chancery in the State Court to establish and quiet his title to a tract of land, and to cancel and annul the title of the California Powder Company as a cloud upon his title. Davis claimed title under a complete Mexican grant made in 1846 and confirmed by the United States in 1854, while the California Powder Company likewise claimed title under a completely Spanish grant which purported to have been made in 1832, and which was confirmed by the United States in 1835. Under the doctrine of the *United States* v. *Perchman*, 7 Peters, 86 (*supra*), the confirmatory acts of Congress only released the rights of the United

States to the grantees, but did not, as between the claimants, affect the titles claimed under the respective Spanish grants. As between the parties, their titles rested solely upon these grants protected by the treaty between the United States and Spain. Davis claimed that the grant under which the California Powder Company derived title was fraudulent and void, and the State court so held. The case was carried to this court, and it held that the controversy was as to the validity of the grant to the California Powder Company, and did not involve any Federal question.

In *Kennedy* v. *Hunt*, 7 Howard, 586, the controversy was over a water front. Prior to 1800, Forbes & Co., under whom Hunt claimed title, obtained a Spanish grant of a tract of land that did not extend to the water front; in 1807, the Spanish Intendent General made a grant to Forbes & Co. of another tract, adjoining the former grant, and extending to the water front. Price, under whom Kennedy claimed title, had prior to 1800, obtained an incomplete Spanish grant of a tract that conflicted with the last grant to Forbes & Co., and this grant was confirmed by the United States in 1829. The treaty between Spain and the United States, by which the territory in controversy was ceded, provided that all grants made by Spain subsequent to 1800, should be void, except in certain cases where the grantee had been in possession prior to that time. Kennedy claimed that the Forbes grant was void, under the treaty, because made subsequent to 1800, but State Court held the title valid, and Kennedy carried the case to this court where it was held that no Federal question was presented, and that it could not consider the question of the validity or invalidity of the Forbes grant.

In the case at bar the plaintiff in error claims title under an alleged complete Spanish grant, while defendants in error claim that the alleged grant is void, and the state court has so held; so that the controversy between the parties is as to the validity of an alleged complete Spanish grant and is exactly the same question that was held in the three cases last cited to involve no Federal question which could confer jurisdiction upon this court to review the case; there is, however, at least one more decision of this court, to the same effect, in which the fact of the case to which the doctrine is applied illustrates most aptly and clearly the application of the principal to the case at bar, in that both in the case at bar and in the case referred to, the Spanish title was attacked and held by the state court to be void for want of authority in the officers from whose acts the alleged titles were supposed to have been derived.

Phillip v. *Mound City Land and Water Company*, 124 U. S. 605.

In this case a controversy arose over certain Mexican grants. The Mexican government made a grant to Palomares and Vigar of a tract known as the Rancho San Jose'; they afterwards formed a partnership with one Arenas, who obtained a third interest in the grant; an additional grant was then made to the firm, and subsequently a partition of the property was had before a Mexican tribunal, and one Dalton succeeded to the interest of Arenas. The territory was afterwards ceded to the United States, and Palomares presented to the commissioners, appointed by the United States to adjust Mexican grants, his claim to an undivided interest in the property, while Dalton and Vigar each presented a claim to the portions of the property allotted to them in the partition proceedings. The commissioners recommended the claims

for confirmation in severalty according to the petitions of Vigar and Dalton; an appeal was taken to the District Court and the grant was confirmed, as made, without reference to the partition proceedings. Subsequently Phillips, having succeeded to one of these interests, filed proceedings in the state court for a partition of the property, assuming that the Mexican tribunal had no authority to make the partition, and that the partition was, therefore, void and the property still held in common; the state court sustained this contention, and partitioned the property, and its decision was affirmed by the highest court of the state. The Mound City Land and Water Company, having succeeded to an interest in the property and being a party to the cause, carried it to this court, claiming that at the time the territory was ceded to the United States the parties held in severalty under the partition proceedings had before the Mexican tribunal, and that such title was, therefore, protected by the treaty between the United States and Mexico; it claimed right and title to part of the property in severalty under this treaty, and therefore contended that a Federal question was involved in the decision of the state court, and had been adjudicated adversely to a right claimed under the treaty. The direct question, whether a decision by a state court, made after the treaty had been executed, holding a title, alleged to have existed under a Mexican, judgment, void for want of authority in the Mexican tribunal involved a Federal question, was presented to this court for adjudication, and it held that: "Article VIII of the treaty protected "all existing property rights within the limits of the "ceded territory, but it neither created the rights nor "defined them. Their existence was not made to depend "upon the constitution, laws or treaties of the United

"States. There was nothing done but to provide that if "they did in fact exist under Mexican law or by reason of "the action of Mexican authorities they should be pro- "tected. Neither was any provision made as to the way "of determining their existence. All that was left by im- "plication to the ordinary judicial tribunals. Any court, "whether state or national, having jurisdiction of the "parties and of the subject-matter of the action was free "to act in the premises. * * * A valid partition would "have created rignts which the United States would have "been bound to respect. That is not denied. * * * "The only question is whether such a partition was made, "and upon that the decision of the state court is final and "not subject to review."

This language is equally applicable to the case at bar. It was not disputed that a Mexican tribunal had made a partition, but it had been held by the state court that the tribunal had no authority to do so, and hence, that the partition was void. In the case at bar it is not denied that Ramerez made the grant under which the plaintiff in error claims, but it has been held by the state court that he had no authoriity to make it as to the *locus in quo*, and that the grant is, therefore, to that extent void. In each case the title, if it existed, was protected by a treaty, but the question was as to the existence, or rather the validity of the title, and this court holds this to be a question for the decision of the state court, and not subject to review.

So that case is absolutely conclusive against the jurisdiction of this court to review the case at bar.

Gregory L. Smith

Of counsel for appellee, the Louisville and Nashville Railroad Company.